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No. 95-457

In the Supreme Court of the United States

OCTOBER TERM, 1995

CESAR A. PERALES, COMMISSIONER, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL., PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' claim that the INS violated the Immigration Reform and Control Act of 1986 (IRCA) and the Due Process Clause of the Fifth Amendment in disseminating information about eligibility for legalization under IRCA was ripe for adjudication.

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OPINIONS BELOW

The opinion of the district court dismissing petitioners' claims on the merits (Pet. App. 70a-141a) is reported at 762 F. Supp. 1036. The first opinion of the court of appeals (Pet. App. 36a-69a), reversing and remanding for further proceedings, is reported at 967 F.2d 798. The order of this Court (Pet. App. 35a), vacating the decision of the court of appeals and remanding the case for further proceedings in light of *Reno* v. *Catholic Social Services, Inc.*, 113 S. Ct. 2485 (1993), is reported at 113 S. Ct. 3027. The initial order of the court of appeals on remand (Pet. App. 32a-34a) is

reported at 4 F.3d 99. The final opinion of the court of appeals (Pet. App. 1a-31a), which is the subject of the certiorari petition, is reported at 48 F.3d 1305.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1995. A petition for rehearing was denied on May 23, 1995. App., *infra*, 1a. On July 27, 1995, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including September 20, 1995. The petition for a writ of certiorari was filed on September 19, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case is one of several class actions challenging the administration of the legalization or "amnesty" program for undocumented aliens that was authorized by the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. That program was established as a one-time opportunity for undocumented aliens to obtain lawful residence in this country. See 8 U.S.C. 1255a. Under IRCA, an alien seeking legalization must meet certain substantive requirements to qualify for relief. Specifically, the alien must establish continuous unlawful residence in the United States since before January 1, 1982; continuous physical presence in the United States since November 6, 1986 (the date IRCA was enacted); and admissibility to the United States as an immigrant. IRCA also required an alien seeking legalization to file a timely application during a 12-month period to be designated by the Attorney General. 8 U.S.C. 1255a(a). The Attorney General designated the application period as the year from

May 5, 1987, through May 4, 1988. 8 C.F.R. 245a.2(a)(1); 52 Fed. Reg. 16,206, 16,208 (1987).

This case involves 8 U.S.C. 1255a(a)(4), which provides that legalization is available only to individuals who are "admissible to the United States as an immigrant" under Section 212(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(a). One class of aliens not "admissible as immigrants," and therefore not eligible for legalization, includes those who, "in the opinion of the Attorney General at the time of application for admission, are likely at any time to become public charges." 8 U.S.C. 1182(a)(15) (1988).[1] IRCA mitigated that restriction by creating a "Special Rule for Determination of Public Charge." 8 U.S.C. 1255a(d)(2)(B)(iii). The Special Rule provides that "[a]n alien is not ineligible for adjustment of status * * * due to being inadmissible [as a potential public charge] if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance." *Ibid.*

On May 1, 1987, the INS published final regulations to implement the relevant provisions of IRCA. With respect to the likelihood that an alien would become a public charge, the regulations provided that the INS would consider whether the alien's dependents, as well as the alien, had received public cash assistance. See 52 Fed. Reg. 16,209 (1987); 8 C.F.R. 245a.1(i) (1988). The regulations also implemented the statutory Special Rule by providing that "[a]n alien who

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[1] Section 601(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5067, reorganized the conditions of excludability in Section 212 of the INA. The analogous condition now appears at 8 U.S.C. 1182(a)(4).

has a consistent employment history which shows the ability to support himself and his or her family * * * may be admissible" through a discretionary waiver from the Attorney General. 52 Fed. Reg. 16,212 (1987); 8 C.F.R. 245a.2(k)(4) (1988).

The INS subsequently amended its regulations in two pertinent respects. On November 17, 1987, it deleted the requirement that an alien file an application for a discretionary waiver to obtain the benefit of the Special Rule. 52 Fed. Reg. 43,844, 43,845 (1987); 8 C.F.R. 245a.2(k)(4). In July 1989, the INS amended its regulatory definition of "public cash assistance" to delete all references to aliens' family members, and thereby made it clear that the receipt of public cash assistance by immediate family members, including United States citizen children, would have no bearing on an applicant's eligibility for legalization. See 54 Fed. Reg. 29,443, 29,448 (1989); 8 C.F.R. 245a.1(i).

2. This lawsuit was filed on April 1, 1988, shortly before the expiration of the statutory 12-month period for filing legalization applications. The plaintiffs (petitioners here) are the State of New York, the City of New York, and individuals representing a class of undocumented aliens residing in New York State who had not filed applications for legalization but who alleged that they had been discouraged from so applying because they had been led to believe that the INS had adopted a *per se* rule disqualifying persons whose immediate family members had received public cash assistance. Petitioners raised two claims: first, that the INS's public charge regulations were substantively invalid under IRCA, and second, that the INS had violated its duty, imposed by IRCA itself (see 8 U.S.C. 1255a(i)), to disseminate accurate information about eligibility for legalization. In advancing

the latter, "procedural" claim, petitioners also invoked the Due Process Clause of the Fifth Amendment. See Pet. 6-7; Pet. App. 72a. Petitioners requested that the district court declare the public charge regulation invalid and extend the statutory deadline for legalization applications, so that class members could have a full 12-month period in which to file their applications. Pet. App. 82a.

After a six-day trial, the district court ruled against petitioners on both claims. Pet. App. 70a-141a. The court ruled that the public charge regulations, taken as a whole, were not inconsistent with IRCA. *Id.* at 118a-123a. It also held that "the substance and scope of INS's outreach, education, and public awareness efforts broadly complied with its obligations under [IRCA] and the Constitution to inform undocumented aliens of their rights under IRCA." *Id.* at 129a. The court further concluded that, even if petitioners had prevailed on the merits, it did not have the authority to compel the INS to accept legalization applications after expiration of the statutory amnesty period. *Id.* at 131a-138a.

3. The court of appeals reversed and remanded. Pet. App. 36a-69a. The court of appeals held that the public charge regulations were unlawfully restrictive. *Id.* at 55a-57a. It also concluded that the courts have the authority to require the INS to extend the statutory deadline for acceptance of legalization applications to be considered under the correct standard. *Id.* at 60a-68a. The court therefore ordered the INS to disseminate correct information about eligibility for legalization and to extend the deadline for legalization applications from class members for one year. *Id.* at 68a. The court of appeals did not address petitioners'

claim that the INS had failed to disseminate correct information about legalization.

The INS filed a petition for a writ of certiorari. On June 28, 1993, this Court granted that petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *Reno* v. *Catholic Social Services, Inc.*, 113 S. Ct. 2485 (*CSS*). Pet. App. 35a. In *CSS*, this Court held that aliens who had not filed legalization applications did not have ripe claims for review in attempting to challenge the validity of INS regulations implementing two different conditions for legalization under IRCA. The Court held that, because IRCA "requires each alien desiring the benefit [of legalization] to take further affirmative steps, and to satisfy criteria beyond those addressed by the disputed regulations[,] * * * a class member's claim would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him." 113 S. Ct. at 2496. The Court recognized a limited exception to the rule that only persons who had filed legalization applications had ripe claims for review: an alien who had not even been permitted to file a legalization application (*i.e.*, an alien who had been "front-desked") because an INS official had determined, based on a cursory review of the application, that the alien was not eligible for legalization, had a ripe claim. *Id.* at 2497-2498. The Court also stated that it could not rule out the possibility that aliens who were not "front-desked" might nevertheless have ripe claims if they demonstrated that the front-desking policy was a "substantial cause" of their failure to apply. *Id.* at 2500 n.28.

4. On remand, the court of appeals initially remanded the case to the district court. Pet. App.

32a-34a. On request by both parties, however, the court recalled its mandate and agreed to consider whether petitioners' "procedural" dissemination claim, not previously addressed by the court of appeals, was properly dismissed by the district court. After additional arguments, the court affirmed the dismissal of the dissemination claim and remanded for further proceedings on the substantive challenge to the public charge regulations. See *id.* at 3a.

The court of appeals observed that petitioners had presented "two distinct formulations of their procedural claims": first, that the INS had disseminated information about eligibility that contravened the correct substantive standards for eligibility under IRCA, and second, that the eligibility information disseminated by the INS was inaccurate because it contravened the actual practices followed by the INS when processing legalization applications. Pet. App. 14a. The court concluded, based on this Court's decision in *CSS*, that the claim predicated on the first formulation was not ripe for judicial review, because it would necessarily require the court to determine the validity of the INS's public charge regulations before they were applied to any member of the class. "To hold otherwise," stated the court, "would mean that potential applicants of any government program would be entitled to a court ruling on the validity of an agency's implementing regulations upon their mere dissemination and before the regulations were even enforced. Such a pre-enforcement ruling is exactly what *CSS* forbids." *Id.* at 15a.

The court of appeals further concluded that the claim based on the second formulation was ripe because it did not challenge the substance of the public charge regulations, but merely "the lack of

adequate notice" to class members. Pet. App. 15a-16a. On the merits of that claim, however, the court held that "the INS's dissemination of information regarding the application process and relevant eligibility standards did not violate the class members' statutory and constitutional rights." *Id.* at 18a. In so ruling, the court noted that the INS Commissioner had notified the agency's four regional offices that certain cash benefits received by an applicant's family would be attributed to the applicant only "if it was [the applicant's] sole means of support," *id.* at 20a, which contradicted the contention that the INS had treated a family member's receipt of public cash assistance as a *per se* basis of disqualification. The court concluded that, "[a]lthough the INS's initial regulations may have been awkwardly drafted, they placed aliens on sufficient notice of the requirements to obtain amnesty under IRCA, as required by 8 U.S.C. § 1255a(i), and of the rules and standards for receiving newly-created benefits, as required by the Due Process Clause." *Id.* at 21a.

The court also rejected petitioners' argument that the INS violated IRCA and the Due Process Clause when, during the statutory application period, it deleted the requirement that aliens file for a discretionary waiver of the Special Rule without broadly disseminating information about that deletion to the public. The court noted that the INS had communicated that change throughout the agency and in the *Federal Register*, and it concluded that "[n]owhere in IRCA is there a mandate that the INS must undertake a media campaign regarding revisions to the application process." Pet. App. 22a.

Although the court thus disposed entirely of the dissemination claims, it nonetheless remanded the

case for further proceedings on petitioners' substantive challenge to the public charge regulations, so that the district court could determine in the first instance whether any of the individual petitioners had been "front-desked" as defined by *CSS*, and whether the governmental petitioners had standing to sue. Pet. App. 24a.[2]

ARGUMENT

Petitioners seek review only of that aspect of the court of appeals' decision that holds that the first formulation of their dissemination claim is not ripe for judicial review. The court of appeals' decision on that narrow issue does not conflict with the decision of any other court of appeals, and it adheres closely to this Court's holding in *CSS* that an alien's challenge to the validity of regulations promulgated under IRCA is not ripe unless the alien "took the affirmative steps that he could take before the INS blocked his path by applying the [challenged] regulation to him." 113 S. Ct. at 2496. Further review is therefore not warranted.

1. Petitioners argue (Pet. 15-16) that the decision below creates a "new, categorical rule that benefit-restricting regulations must be shielded from judicial scrutiny" in all cases. That is not a correct characterization of the court of appeals' decision, which does

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[2] Circuit Judge Cardamone dissented in part. Pet. App. 25a-31a. He concluded that, under the INS's initial public charge regulations, immigrants whose family members received public cash assistance were ineligible for legalization (*id.* at 29a), and that those regulations failed "to reasonably inform [would-be applicants] of information necessary for them to realize they were potentially eligible for legalization, in violation of [IRCA]" (*id.* at 31a).

not create any broad exception to the presumption that administrative actions are subject to judicial review. The court of appeals followed this Court's decision in *CSS* and held that the first formulation of petitioners' dissemination claim is not ripe because they have sought to challenge the validity of regulations before the INS has applied those regulations to deny any class member's application for legalization.

In *CSS*, the plaintiffs contended that regulations promulgated by the INS were facially inconsistent with IRCA's provision that an alien's "brief, casual, and innocent absence[] from the United States" does not prevent the alien from demonstrating (as a condition for legalization) "continuous physical presence" in the United States since the enactment of IRCA. See 113 S. Ct. at 2490. Although the class members in *CSS* alleged that the regulations had harmed them by discouraging them from applying for legalization, the Court held that, because they had not actually applied and the INS therefore had never applied the challenged regulations to their cases, they had not been concretely affected by the regulations:

> In some cases, the promulgation of a regulation will itself affect parties concretely enough to satisfy [the ripeness] requirement [where it presents] * * * plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation. * * *
>
> The regulations challenged here fall on the [other] side of the line. They impose no penalties for violating any newly imposed restriction, but limit access to a benefit created by [IRCA] but not

> automatically bestowed on eligible aliens. Rather, [IRCA] requires each alien desiring the benefit to take further affirmative steps, and to satisfy criteria beyond those addressed by the disputed regulations. [IRCA] delegates to the INS the task of determining on a case-by-case basis whether each applicant has met all of [IRCA's] conditions, not merely those interpreted by the regulations in question. In these circumstances, the promulgation of the challenged regulations did not itself give each * * * class member a ripe claim; a class member's claim would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him.

Id. at 2495-2496 (footnote omitted).

Although, in this case, petitioners framed the first formulation of their dissemination claim as a procedural claim, it is, in fact, inextricably intertwined with, and essentially identical to, their allegation that the public charge regulation was substantively in conflict with IRCA—an allegation that is not analytically different from the claim considered in *CSS*. Petitioners contend that the INS violated a statutory and constitutional obligation to disseminate accurate information about eligibility when it published the allegedly unlawful public charge regulations and disseminated information about those regulations. To adjudicate that claim, the courts would have to decide whether the INS's public charge regulations were valid, for if they were, then the eligibility information disseminated by the INS would not have been inaccurate, as petitioners allege. Like their substantive claim, therefore, petitioners' dis-

semination claim "turns upon a determination of [the] regulation's validity." Pet. App. 14a. The court of appeals properly looked beyond the label attached to the dissemination claim when it concluded that it was bound by *CSS* to dismiss the first formulation of that claim on ripeness grounds.

Petitioners err in suggesting (Pet. 18 n.3) that the court of appeals' decision effectively forecloses them from bringing any challenge to the INS's dissemination practices. As the Court noted in *CSS*, aliens challenging the substantive validity of a regulation as inconsistent with IRCA "would be able to obtain such review on appeal from a deportation order, if they become subject to such an order." 113 S. Ct. at 2497. The court of appeals' holding on ripeness therefore concerns only the timing of petitioners' claims and does not foreclose judicial review. But that judicial review, although available, "is subject to an implicit limitation" that relief is available only in the "context of a controversy 'ripe' for judicial resolution." *Id.* at 2495.

In *CSS*, the Court emphasized that the alien must at least attempt to take all the affirmative steps necessary to apply for legalization and to satisfy the conditions for legalization within the statutory filing period. Whether their claims are viewed as procedural or substantive, the individual petitioners in this case have not demonstrated that the INS's administration of the legalization program concretely affected their ability to receive the benefit of that program, for they failed to demonstrate their willingness to take all the steps necessary to file a timely application. See *CSS*, 113 S. Ct. at 2497 n.20 ("Neither the fact that the application period is now over, nor the fact that the plaintiffs would now like

the period to be extended, tells us anything about the willingness of the class members to take the required affirmative steps, or about their satisfaction of [IRCA's] other conditions.").[3]

2. Petitioners also urge the Court to reconsider *CSS*. Pet. 25-30. "[A]ny departure from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984). Petitioners have not presented any "special justification" for the reconsideration of *CSS*. There has been no showing that *CSS* impedes "coherence and stability in the law," *Hubbard* v. *United States*, 115 S. Ct. 1754, 1765 (1995) (plurality opinion), or that it has "unacceptable consequences," *id.* at 1765 (Scalia, J., concurring in part and concurring in the judgment). Contrary to petitioners' contention (Pet. 29), *CSS* was not "an abrupt and largely unexplained departure" from prior precedent. The Court in *CSS* relied on the same ripeness analysis that has been employed since *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), and it relied directly on a companion case to

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[3] In addition, it does not appear that a reversal of the court of appeals' ruling on ripeness would advance petitioners' case. The court of appeals affirmed the district court's dismissal of the second formulation of the dissemination claim because it agreed with the district court that "the INS satisfied its duty to disseminate accurate information regarding the amnesty program." Pet. App. 25a. Petitioners have not sought review of that aspect of the decision below. Thus, even if petitioners persuaded the Court that the first formulation of their dissemination claim was ripe, they nonetheless could not prevail on the merits of that claim. Cf. *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) ("[I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

Abbott Laboratories, namely *Toilet Goods Association* v. *Gardner*, 387 U.S. 158 (1967), in which a pre-enforcement challenge to a set of regulations was held not ripe. See *CSS*, 113 S. Ct. at 2495-2496. And, although petitioners have cited articles and treatises criticizing *CSS*, reactions of that kind are often to be found after the Court renders a decision; they are not generally considered to be a sufficient basis for reconsidering a precedent. Cf. *Hubbard*, 115 S. Ct. at 1765 (Scalia, J., concurring in part and concurring in the judgment) (departure from *stare decisis* requires "reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all)"). Accordingly, there is no doctrinal basis for reconsidering *CSS*.

Departure from *stare decisis* would be especially unwarranted in this context. *CSS*, like this case, involved eligibility standards and application procedures under the special legalization program established by IRCA. The one-year application period for that program expired more than seven years ago. The court of appeals properly rejected petitioners' efforts to reopen that application period on the basis of allegations concerning the dissemination of information about the program many years ago. There is no reason for the Court to repudiate the principles applied in *CSS* to facilitate the extension of the deadline that Congress and the Attorney General established for applications for the special benefits that were once made available under the legalization program.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1995

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of May one thousand nine hundred and ninety five.

Docket No. 91-6133

CESAR A. PERALES, PLAINTIFFS-APPELLANTS,
FRAN FOE, ET AL., PLAINTIFFS-INTERVENORS-APPELLANTS

v.

JANET RENO, ET AL., DEFENDANTS-APPELLEES

[Filed May 23, 1995]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Cesar A. Perales, et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other

judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the court

GEORGE LANGE III, Clerk

By:

/s/ KATHY BROUWER

KATHY BROUWER (Date)

Operations Mgr.